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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 9

RALPH D. ABERNATHY, CLYDE CARTER, WILLIAM S. COFFIN, JR., JOSEPH CHARLES JONES, BERNARD S. LEE, JOHN DAVID MAGUIRE, GAYLORD B. NOYCE, FRED L. SHUTTLESWORTH, GEORGE SMITH, DAVID E. SWIFT, and WYATT T. WALKER,

Petitioners

v.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Richmond M. Flowers
Attorney General of Alabama

Leslie Hall
Assistant Attorney General
of Alabama

Administrative Building
Montgomery, Alabama 36104

Attorneys for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 575

RALPH D. ABERNATHY, CLYDE CARTER, WILLIAM S. COFFIN, JR., JOSEPH CHARLES JONES, BERNARD S. LEE, JOHN DAVID MAGUIRE, GAYLORD B. NOYCE, FRED L. SHUTTLESWORTH, GEORGE SMITH, DAVID E. SWIFT, and WYATT T. WALKER,

Petitioners

v.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

QUESTION PRESENTED

WHETHER PERSONS WHO, WITH FULL KNOWLEDGE OF A TENSE SITUATION, DELIBERATELY ENGAGE IN CONDUCT CALCULATED TO PROVOKE A BREACH OF THE PEACE, ARE CONSTITUTIONALLY IMMUNE FROM PROSECUTION FOR SUCH CONDUCT.

ARGUMENT

The Respondent respectfully contends that the Petition for a Writ of Certiorari should be denied. A person may be guilty of a breach of the peace if he commits any act or engages in any conduct inciting others to violence or to

break the peace, even though no such eventuality be intended. The evidence affirmatively established that at the time the petitioners arrived at the bus station under military escort, there were at least eighteen people other than the petitioners and law enforcement officers inside the station (R. 77); that four or five hundred people were outside the station but in the immediate vicinity (R. 77); that riots had broken out on the previous Saturday in the vicinity of another bus station (R. 79); that another riot had broken out on the previous Sunday in which over a thousand persons were involved (R. 81); that the latter riot occurred in the vicinity of the church of Rev. Ralph D. Abernathy, one of the petitioners in this case (R. 82); that the situation was extremely tense during this time with incidents of racial unrest (R. 128); that the people were hostile to the appellants (R. 131); that the appellants knew of the danger (R. 129); that it was possible for the crowd to see inside the station from the outside (R. 133); that the tension was increased when the petitioners took seats at the lunch counter (R. 133); and that an outburst of noise which grew louder was heard from the crowd outside when the group sat down at the lunch counter (R. 98, 103); that there was danger of injury, not only to the petitioners, but to innocent passers-by or people who had no connection with either side of this particular trouble, as well as to the National Guardsmen themselves (R. 134); that on the previous day, the petitioners had been met by a hostile crowd of some two thousand persons who had stoned the car in which they were riding (R. 143, 144); that the presence of the petitioners created the danger of provoking a riot and breach of the peace (R. 149), and this evidence was undisputed; that of the eleven petitioners, four of them, namely, Abernathy, Walker, Lee and Shuttlesworth, who are Negroes, were not interstate travelers at this time (R. 178); and that of the other seven, four who are white have no basis for claiming

their rights have been violated on account of race or color.

Under all the facts and circumstances existing at the time of the arrest of the petitioners, the petitioners knew or should have known that seating themselves as a mixed racial group at the lunch counter in full view of a tense and hostile crowd was calculated to cause violence or breach of the peace. The mere fact that they, themselves, did not engage in any violence, use profanity, or conduct themselves boisterously cannot excuse their conduct in the light of the surrounding circumstances, and such conduct amounted to a breach of the peace for which they were properly arrested, charged, tried, and convicted.

As was well said by Mr. Justice Roberts in *Cantwell v. Connecticut*, 310 U.S. 296, 308, 84 L.ed 1213, 1220, 128 ALR 1352, 1359:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions excitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious."

The principle was again well stated by Mr. Chief Justice Vinson in *Feiner v. New York*, 340 U.S. 315, 319, 95 L.ed 295, 299 where it was said:

> "We are not faced here with blind condonation by a State court of arbitrary police action. Peti-

tioner was accorded a full, fair trial. The trial judge had testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial court reached the conclusion that the police officers were justified in taking the action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for making or the content of his speech. Rather, it was the reaction which it actually engendered . . . . The findings of the New York Courts as to the condition of the crowd and the refusal of petitioner to obey the police request, supported as they are by the record in this case are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This court respects, as it must, the interest of the community in maintaining peace and order on its streets."

In a concurring opinion appearing in 95 L.ed at page 280, Mr. Justice Frankfurter said of the police that:

"They interfered only when they apprehended imminence of violence. It is not a constitutional principle that, in acting to preserve order, the police

> must proceed against the crowd, whatever its size or temper, and not against the speaker."

Mr. Justice Frankfurter also said at page 279 that the Supreme Court:

> "Should not re-examine determinations of the State courts on 'those matters which are usually termed issues of fact.' And it should not overturn a fair appraisal of facts made by State courts in the light of their knowledge of local conditions."

The same principle should govern this Court in considering the present petition for certiorari.

An assembly of persons together for the effectuation of even a lawful purpose, by means such as would give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace, is an unlawful assembly. It is undisputed on the evidence in this case that some of the petitioners assembled together to ride buses through the State of Alabama, and to use all of the facilities which were an integral part of the bus station, knowing full well that their actions in doing so would give any rational, firm, and courageous persons in the neighborhood a well-grounded fear of a breach of the peace. Under the circumstances, this constituted an unlawful assembly. The futility of attempting for future guidance to adopt an inflexible definition of all circumstances and conditions which might arise in the course of human events to denominate an assembly as unlawful is obvious. As the Court said in *State v. Butterworth*, 104 N.J.L. 579, 142 AT. 57, 58 ALR 744, 748:

> "Each case largely and necessarily depends upon the object and character of the meeting, and whether or not the overt acts done by the participants therein,

> was pursuant to a common understanding, or of such a nature as to inspire well-grounded fear in persons of reasonable firmness and courage of a riot, rout, affray, or other breach of the public peace."

After discussing the case of *Reg. v. Graham*, 16 Cox C.C. 420, 46 Am.Jur. 128, that Court went on to say:

> "The legal principle, however, to be extracted from the cases at common law, seems to be that in order to constitute the offense of unlawful assembly, it must appear that it was a common intent of the persons assembled to attain a purpose, whether lawful or unlawful, by the commission of such acts of intimidation and disorder which are likely to produce danger to the tranquility and peace of the neighborhood, and have a natural tendency to inspire rational, firm, and courageous persons in the neighborhood with well-grounded fear of serious breaches of the public peace."

Deliberate conduct calculated to provoke violence or breach of the peace is not protected by the freedom of speech, religion, assembly, and association provisions of the Fourteenth Amendment to the United States Constitution. The City of Montgomery, Alabama, at the time the arrests in question were made had been placed under martial rule and the National Guard had been sent into the city for the purpose of helping maintain law and order. The Sheriff of Montgomery County, Alabama, was working with the National Guard Officers and cooperating with them in the unified over-all effort to prevent riots and bloodshed. The arrests were made in pursuance of a direct order from the National Guard Commanding Officer. The arrests were entirely justified under the prevailing conditions of unrest and tension and were made only after all reasonable efforts to quell the menacing riots had proved unsuccessful. There is no evidence that the arrests were made in pursuance of

any policy, practice, custom, or usage to enforce segregation of the races.

The petitioners, as part of the Freedom Ride Movement, had broadcast their intention to create agitation in Montgomery well in advance of their arrival. Extensive effort was made on their behalf to insure that a tense atmosphere would await them. This advance publicity amounted to a general broadcast of the intended agitation.

The petitioners were thus in an "explosive situation." They were arrested because a riot was threatened—a riot which they were inciting. Under the circumstances, it is apparent, that they would have been arrested whether they were at an eating place or elsewhere and regardless of their race or color.

The Supreme Court of the United States, as a matter of principle, has consistently recognized that a constitutionally protected right does not render immune actions or utterances tending to incite an immediate breach of the peace or riot, but that, when such conduct produces a clear and present danger to a substantial interest of the State, or of a serious substantive evil, it may be stopped or regulated. *Gitlow v. New York*, 268 U.S. 652, 667, 69 L.ed 1138, 1146, 45 S.Ct. 625; *Whitney v. California*, 274 U.S. 357, 374, 71 L.ed 1095, 1104, 47 S.Ct. 641.

In *Kovacs v. Cooper*, 336 U.S. 77, 93 L.ed 513, 69 S.Ct. 448, 10 ALR 2d 608, a case involving the limitation and regulation of sound trucks in public streets, the Supreme Court of the United States said:

> "Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Saia* case (334 U.S. 558, 92 L.ed 1574, 68 S.Ct. 1148) recognized that in this field by stating: 'The hours and place of public

> discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, *Schenck v. United States*, 249 U.S. 47, 52, 63 L.ed 470, 473, 39 S.Ct. 247, that: 'The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all of the effect of force.'
>
> "Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

Constitutional rights involving conduct as free speech or assembly are not absolute and unlimited at all times and under all circumstances. The Constitution does not give immunity to every possible use of language and does not prevent the punishment of those who abuse constitutional freedom and does not imply the right to paralyze the means for effective protection of all the freedoms secured by the Bill of Rights, nor does the Constitution give even "Freedom Riders" the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 62 L.ed 1186, 38 S.Ct. 560.

The essential rights of the First Amendment in some instances are subject to the elemental needs for order without which guarantees of Civil Rights to others would be a mockery. *United Public Workers v. Mitchell*, 330 U.S. 75, 95, 91 L.ed 754, 770, 67 S.Ct. 556.

The petitioners in this case used extensive publicity to attract the crowd on May 25, 1961. They asked for a mili-

tary escort to the bus station where, as they anticipated, a large and boisterous crowd was present. In the face of the imminence of a riot, the arrests were ordered. In the case of *Powers Mercantile Co, et al. v. Olson, Governor of Minnesota*, 7 F. Supp. 865, the court held that:

> "Under military rule, constitutional rights of individuals must give way to the necessities of the situation; and the deprivation of such rights, made necessary an order to restore the community to order under law, cannot be made basis for injunction or redress."

The cases cited are based on the clear and present danger doctrine—a clear and imminent danger of some substantive evil which the State has been justified in preventing. There have been many cases in which the public welfare has deemed to be more important than any individual rights. It is not necessary here to go into the question of the constitutionality of the plaintiff's action in utilizing the facilities involved. The question as it applies in this case, as we see it, is whether the arrests were made under a justifiable situation.

In *Egan v. City of Aurora*, 174 F. Supp. 794, the Court said:

> "It is likewise apparent that federal courts cannot be so overzealous in their desire to protect individual rights from State abuse that they unjustifiably deprive the States of their inherent sovereignty, also protected by the United States Constitution."

The petitioners, both in the trial of this case below, and in their petition for a writ of certiorari and argument here, have sought to inject into this case certain proceedings which occurred in the United States District Court for the Middle District of Alabama, in the case of *Lewis v. Grey-*

hound Lines, Inc., et al., totally ignoring what that same Court said in its decree on June 2, 1961 in the case of *United States v. U.S. Klans, et al.*, Civil Action No. 1718-N, 6 Race Relations Law Reporter 528, 194 F. Supp. 897. In entering a temporary restraining order in that case, Judge Johnson said as follows:

> "This is not a restraining order enjoining individuals or groups who are traveling in interstate commerce through Alabama and through this District on bona fide trips. It is only directed to and against those organizations and individuals specifically named, or other like organizations or individuals acting in concert with them or acting as their agents or attorneys, that have been and are engaging and assisting, encouraging, financing and sponsoring groups and/or individuals in traveling in interstate commerce for the specific and announced purpose of testing and demonstrating. Such action has caused and is causing an undue burden and restraint on interstate commerce, resulting here in this State in the past few weeks in disrupting schedules of interstate carriers and causing bona fide interstate passengers to be subjected to violence, threats, intimidation, and general inconvenience. While it is true that this violence is caused directly by the Klan groups and others acting in concert with them, and has been allowed by the wilful failure of the police authorities to take the usual adequate, protective measures, it is equally true that the Congress of Racial Equality, the Southern Christian Leadership Conference, Ralph D. Abernathy, F. L. Shuttlesworth, Martin Luther King, Jr., and others acting in concert with them, by their actions in financing and sponsoring and aiding and assisting such bona fide trips are directly causing an undue burden and restraint upon interstate commerce within the State of Alabama and within this district."

Thus it will be seen that the very Federal Court on which

the petitioners so heavily rely, found as a matter of fact that the petitioners, Ralph D. Abernathy and F. L. Shuttlesworth, as well as possibly others, were directly responsible for creating the situation of which they now complain.

On page 30 of their petition, the petitioners seem to imply that the State has an obligation to play nursemaid to outside agitators. On the same page they complain of the fact that the State failed to arrest the persons who poured coffee on the seats at the lunch counter. The principle is too well established to require citation of authorities that the failure to arrest and prosecute others is no excuse for the commission of a crime.

A person cannot breach the peace and then hide behind the United States Constitution on the ground that he is a traveler in interstate commerce. Although it is conceded that the four white petitioners and three of the Negro petitioners were traveling in interstate commerce, it is respectfully urged that their conduct in inciting a breach of the peace did not constitute interstate commerce. A person, by traveling across state lines, cannot thereby secure immunity from prosecution for violation of local laws. Nor is there anything in the Fourteenth Amendment or any laws enacted pursuant thereto which gives to anyone the right to come into a State to breach the peace or to unlawfully assemble.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Richmond M. Flowers
Attorney General of Alabama

Leslie Hall
Assistant Attorney General
of Alabama

Administrative Building
Montgomery, Alabama 36104

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Leslie Hall, one of the attorneys for Respondent, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of November, 1963, I served the requisite number of copies of the foregoing brief in opposition to petition for a writ of certiorari upon Jack Greenberg, Constance Baker Motley, James M. Nabrit, III, Suite 2030, 10 Columbus Circle, New York 19, N.Y., Fred D. Gray, 34 North Perry Street, Montgomery, Alabama, Louis H. Pollak, 127 Wall Street, New Haven, Connecticut, attorneys for Petitioners, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to them at their respective addresses.

Leslie Hall

Assistant Attorney General
of Alabama
Administrative Building
Montgomery, Alabama 36104